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No. 3--09--0067
(Consolidated with No. 3--09--0068)

Order filed April 21, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 21st Judicial Circuit,
)	Kankakee County, Illinois,
Plaintiff-Appellee,)	
)	
v.)	Nos. 06--CF--347 and
)	07--CF--38
)	
DONNELL EGGLESTON,)	Honorable
)	Clark E. Erickson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Carter and Justice Holdridge concurred in
the judgment.

ORDER

Held: Trial counsel was not ineffective for presenting an alibi defense based upon information he received from the defendant and witnesses provided by the defendant. After changing to a theory of self-defense on the second day of trial, trial counsel was not ineffective for failing to present cumulative evidence of the victim's aggressive acts toward the defendant, when those acts would indicate that the defendant had a motive to harm the victim. The defendant's conviction and sentence for unlawful possession of a weapon by a felon is vacated based upon the one-act, one-crime doctrine.

Following a bench trial, the defendant was convicted of second degree murder (720 ILCS 5/9--2 (West 2006)) for the fatal shooting of Quentin Hardrict. He was also convicted of the following in relation to another shooting involving two other victims: two counts of aggravated battery with a firearm (720 ILCS 5/12--4.2(a)(1) (West 2006)), and a single count of aggravated discharge of a firearm (720 ILCS 5/24--1.2(a)(2) (West 2006)), aggravated unlawful use of a weapon (720 ILCS 5/24--1.6(a)(1), (a)(3)(A) (West 2006)), and unlawful use or possession of a weapon by a felon (720 ILCS 5/24--1.1(a) (West 2006)). The defendant filed a motion for new trial arguing ineffective assistance of counsel, which was denied. He was sentenced to 20 years of imprisonment for second degree murder of Hardrict. He was also given prison sentences of 20 years for each count of aggravated battery with a firearm, 10 years for aggravated discharge of a firearm, and 7 years for aggravated unlawful use of a weapon. These sentences were to be served concurrently with each other and consecutive to the defendant's murder sentence. Finally, the defendant was to serve a 5-year term of imprisonment for unlawful possession of a weapon by a felon consecutively to the other sentences.

On appeal the defendant argues that he was denied effective assistance of counsel because his trial counsel failed to investigate and present evidence of self-defense. He also

contends that his conviction for unlawful possession of a weapon by a felon should be vacated under the one-act, one-crime doctrine. We affirm in part and vacate in part.

FACTS

On May 27, 2006, at approximately 1 a.m., David Davis and Carlos Everett were each shot in the foot near the Plaza liquor store in Kankakee, Illinois. Approximately 25 minutes later, Hardrict was shot approximately one mile away, outside Lee's Lounge in Kankakee, Illinois. Hardrict died.

On October 20, 2006, the defendant was indicted in relation to the shootings of Davis and Everett. The charges were two counts of attempted first degree murder (720 ILCS 5/8--4(a), 9--1(a)(1) (West 2006)), two counts of aggravated battery with a firearm, aggravated discharge of a firearm, aggravated unlawful use of a weapon, and unlawful possession of a weapon by a felon. On January 18, 2007, the defendant was indicted in relation to the shooting of Hardrict with two counts of first degree murder (720 ILCS 5/9--1(a)(1), (a)(2) (West 2006)). The cases were joined. In both cases, the defendant filed discovery disclosures of his intent to implement an alibi defense that he was in Milwaukee, Wisconsin, at the time of the shootings.

On November 5, 2007, the first day of the defendant's bench trial, four witnesses testified for the State. Their testimony indicated that in the weeks prior to the shootings, the defendant

was seen with a black 9 mm. handgun on multiple occasions. The defendant flashed the handgun at Hardrict on one occasion, and they engaged in a fist fight on another occasion. Three days prior to the shootings, the defendant and his friend fired gunshots toward Hardrict, and Hardrict ran away. On one occasion, Hardrict shot a gun into the air and yelled to the defendant to stay away from his family.

Witnesses also testified that 11 hours prior to the shootings, on May 26, 2006, the defendant started shooting toward Hardrict, and Hardrict returned fire with a .38-caliber revolver. At approximately 3 p.m., Hardrict spoke with the defendant's father in an attempt to reconcile the situation. After midnight, the defendant and two other people were seen in an alley near the Plaza liquor store, with guns in their hands. Gunshots were heard. Everett and Davis each had been shot in the foot.

After that shooting, Hardrict approached the defendant's car outside Lee's Lounge. The defendant grabbed a gun from under his seat, and Hardrict ran back toward his car. The defendant raised his gun. A gunshot was heard and Hardrict fell to the ground. The defendant drove away. Hardrict was found near his car with a .38-caliber revolver and a Tech 9 semi-automatic gun near his body. The person with Hardrict that night testified that Hardrict did not have a gun in his hands when he approached the defendant's vehicle. The defendant later told his former

girlfriend that he shot Hardrict.

On the second day of trial, the defendant's attorney informed the court that the defendant was changing his defense from an alibi defense to self-defense based upon a conversation he had with the defendant that "disclosed new information." The State objected, because it had based its prosecution upon the defendant's discovery disclosures that his aunt had picked him up at the Greyhound bus station in Milwaukee, Wisconsin, eight hours prior to the shootings. The court found that the State was not prejudiced by the change in defense and continued the trial for one week.

Dwane Osborne testified that he was employed by Prisoner Transportation Services. On October 12, 2006, while Osborne was transporting the defendant, the defendant said that he shot somebody in the face outside a nightclub for disrespecting him.

Everett testified that three weeks prior to the shootings, the defendant and Hardrict got into an argument. Three days later, Everett heard the defendant call to Hardrict's son, who was the defendant's godson. Hardrict picked up a baseball bat and told the defendant not to speak to his son. Shortly after midnight on the morning of May 27, 2006, Everett saw the defendant in an alley near the Plaza liquor. Everett and Davis ran and then heard five or six gunshots. Everett and Davis both incurred gunshots in the foot.

Corrina Morris testified that sometime after 11 p.m., on May 26, 2006, she was parked outside of Lee's Lounge and saw Hardrict walk past her car. Hardrict made hand gestures and said something toward the car parked next to her car and then began to run. Defendant exited the car parked next to her car and pointed a gun. Morris heard a gunshot. Morris did not notice anything in Hardrict's hand at the time of the shooting.

The defendant testified that he and Hardrict were close friends and that each man was the godfather of the other's child. A few weeks prior to the shootings, they had a falling out. Two weeks prior to the shootings, the defendant and Hardrict's continuing disagreement became physical on one occasion, and Hardrict threatened the defendant with a baseball bat on another occasion. During that time frame, Hardrict also approached the defendant's car and fired gunshots at the car as the defendant drove away. The day after that incident, Hardrict chased after the defendant's car with a gun in his hand, and later four people, including Everett and Hardrict, ran after the defendant's car and shot their guns. A bullet hole was found in the defendant's car, which was owned by his grandmother.

According to the defendant, on the night of the shootings, he saw Everett in the alley by the Plaza liquor store and noticed Hardrict nearby. People started running toward him. The defendant felt as though he was being ambushed, so he started

shooting. He was not trying to shoot anyone. After that, the defendant drove to Lee's Lounge and parked his car. The defendant saw Hardrict running at him with a Tech 9 in his right hand. The defendant grabbed the gun that he was sitting on and fired one shot.

After closing arguments, the defendant was convicted of second degree murder and of all remaining charges, except the attempted murder charges of Everett and Davis. The defendant filed a *pro se* motion of ineffective assistance of counsel, alleging that his trial attorney failed to properly investigate and present evidence in support of his self-defense claim. The court appointed new counsel to represent the defendant, who filed a motion for new trial alleging ineffective assistance of counsel.

At the hearing on the motion, the defendant indicated that during his initial visit with his trial attorney, he attempted to relay Hardrict's acts of aggression toward him, which the defendant believed would have supported a theory of self-defense. At that meeting, the defendant's trial attorney told the defendant that an alibi defense had been established by the defendant's father, family, and friends. The defendant acknowledged that his aunt and her friend told his attorney that he was in Milwaukee, Wisconsin, at the time of the shootings. Despite knowing that he committed the shootings, the defendant

did not correct the false alibi information.

The defendant also told his trial attorney that his grandmother's car had a bullet hole from Hardrict shooting at him while he was driving it, and his grandmother filed a police report. The defendant's trial attorney did not obtain a copy of the police report. On cross-examination, the defendant acknowledged that his grandmother made the police report three days after the defendant shot Hardrict.

The defendant also argued that his trial attorney failed to investigate and present testimony of Hardrict's aggressive acts toward him prior to the shootings. He further claimed that his trial attorney should have interviewed Danyil Taylor, who was an eyewitness to the fatal shooting of Hardrict.

The defendant's trial attorney indicated that the defendant chose to proceed with the alibi defense and that the defendant lied to him in support of that defense. The defendant provided multiple witnesses who verified that the defendant was in Milwaukee at the time of the shootings. The defendant also provided his trial attorney with two false affidavits that indicated the defendant was not the shooter. Although the defendant knew he committed the shootings, he did not inform his trial attorney that the affidavits were false. The week leading up to trial, counsel specifically asked the defendant if he had committed the shootings, and the defendant denied any

involvement.

The defendant's trial attorney acknowledged that the defendant gave him names of witnesses that could have testified to Hardrict's aggressive acts toward the defendant. The defendant's attorney did not want to highlight the animosity between Hardrict and the defendant because such testimony would simultaneously establish a motive for the defendant to want to harm Hardrict.

A letter was introduced into evidence that was written by the defendant to Taylor after the first day of trial. In the letter the defendant wrote that witnesses had testified against him so he could not "win" with his alibi defense and had to switch to self-defense. He told Taylor that the person with Hardrict had found "a 3.8. that was on [Hardrict's] waist and a big ass black Tec 9 that [the witness] said was on the ground next to [Hardrict]." The defendant disclosed to Taylor that he was going to testify that Hardrict was coming toward his car with a gun and that he needed Taylor to "vouch" for him. He told Taylor to testify that he and Taylor had not arrived at Lee Lounge together, but that Taylor got into the defendant's car to talk and then ran away after he saw Hardrict approaching "with a big black gun in his hand." The defendant pleaded, "come through for me bro with you comming [sic] foward [sic] and vouching that [Hardrict] was comming [sic] toward us with a gun is all I need,

and I'm positive I'll get self-[d]efense."

In ruling on the motion, the trial court found that the alibi defense originated with the defendant. The court found that counsel's trial strategy was sound because it was based upon information received from the defendant and denied the defendant's motion for new trial. Thereafter, the defendant was sentenced, as aforesaid. The defendant appealed.

ANALYSIS

On appeal, the defendant argues that the trial court erred in denying his motion for new trial because his trial counsel provided ineffective assistance by failing to investigate and present evidence to support a theory of self-defense. We disagree.

An attorney will be found to have provided ineffective assistance if: (1) counsel's performance fell below an objective standard of reasonableness; and (2) the performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984). The reviewing court must give deference to counsel's conduct within the context of the trial and without the benefit of hindsight. *People v. King*, 316 Ill. App. 3d 901 (2000). As such, the defendant must overcome a strong presumption that counsel's actions or inactions were the result of sound trial strategy. *People v. Houston*, 226 Ill. 2d 135 (2007). Decisions concerning

what evidence to present are matters of trial strategy and are generally immune from claims of ineffective assistance of counsel. *People v. West*, 187 Ill. 2d 418 (1999).

The duty of trial counsel to investigate possible defenses is part of defense counsel's overall obligation. *People v. Kokoraleis*, 159 Ill. 2d 325 (1994). Whether counsel's investigation was reasonable depends on the informed strategic choices of the defendant, as well as information supplied by the defendant. *Kokoraleis*, 159 Ill. 2d 325.

Defendant claims that his trial counsel should have investigated a self-defense theory. The elements of self-defense are: (1) unlawful force was threatened against a person; (2) the person threatened was not the aggressor; (3) the danger of harm was imminent; (4) use of force was necessary; (5) the person threatened subjectively believed a danger existed that required the use of force; and (6) the belief of danger was objectively reasonable. *People v. Lee*, 213 Ill. 2d 218 (2004). When a theory of self-defense is raised, the victim's aggressive and violent character is relevant to show who was the aggressor. *People v. Lynch*, 104 Ill. 2d 194 (1984).

Here, the defendant's trial attorney based his trial strategy upon the defendant's denial of committing the shootings and claiming that he was in Milwaukee, Wisconsin, at the time of the shootings. His strategy was further supported by witnesses

verifying that the defendant was in Wisconsin and affidavits indicating that the defendant was not the shooter. The defendant's trial counsel told the defendant that the aggressive acts of Hardrict would be relevant to his case if the defendant had shot Hardrict but the defendant denied doing so. Thus, the decision to initially proceed with an alibi defense was sound trial strategy and not subject to a claim of ineffective assistance of counsel.

For trial counsel to offer a theory of self-defense would have directly contradicted the defendant's alibi theory in that it would require the defendant to admit that he committed the charged offense. Therefore, the fact that counsel did not investigate such contradictory evidence of self-defense was "rendered strategically inconsequential" while the defendant was asserting an alibi defense. *Kokoraleis*, 159 Ill. 2d at 331.

The defendant additionally claims that after his defense changed to self-defense on the second day of trial, his counsel should have investigated potential witnesses that could have testified to Hardrict's aggressive acts during the week recess. However, testimony of the same aggressive acts by Hardrict toward the defendant that had previously been testified to would have been cumulative. The defendant's trial attorney testified that he did not want to present additional evidence of the animosity between Hardrict and the defendant because he did not want to

establish a motive for the defendant to want to harm Hardrict. Trial counsel's decision to refrain from putting on additional witnesses regarding Hardrict's aggression was based upon sound trial strategy and is immune from a claim of ineffective assistance.

The defendant also argues on appeal, and the State concedes, that the defendant's conviction for unlawful possession of a weapon by a felon (charged as a Class 3 felony) should be vacated under the one-act, one-crime doctrine as a less serious offense than his conviction for aggravated unlawful use of a weapon (charged as a Class 2 felony). Both convictions were premised upon the same physical act, and the less serious conviction must be vacated. See *People v. King*, 66 Ill. 2d 551 (1977) (a criminal defendant may not be convicted of multiple offenses based on the same physical act); *Lee*, 213 Ill. 2d 218 (when a defendant is convicted of two offenses based upon the same single physical act, the less serious offense must be vacated). The crime of unlawful possession of a weapon by a felon, as charged in this case, is a less serious offense than aggravated unlawful use of a weapon (charged as a Class 2 felony) and should be vacated. See *People v. Johnson*, 387 Ill. App. 3d 780 (2009). Therefore, we remand this case to the trial court to amend the sentencing order to reflect that the conviction and sentence for unlawful possession of a weapon by a felon have been vacated.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court of Kankakee County in part, vacate in part, and remand with directions.

Affirmed in part and vacated in part.